IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JUDIRSIDCTION

NOTICE OF MOTION NO. 1633 OF 2004

IN

SUITNO. 116 OF 1998

IN

PETITION NO. 275 OF 1998

MS.AMITA KULINCHAND MOTIWALA AND ANR. ... PLAINTIFFS / PETITIONERS.

VS.

MRS. ROHINI PRADYUMNA KAPADIA ... CAVEATRIX / DEFENDANT

AND

HITESH HIRACHAND DHOKAD ... RESPONDENT.

Mr. Virag Tulzapurkar with Sandeep Parikh i/b. Gordhandas & Fozdar for the Plaintiffs/ Petitioners.

Mr. J. Rais i/b. V.M.Chaudhary for the Defendant/ Caveatrix

Mr. K. Kadam i/b. M.Dhruv & Co. for the Respondent.

CORAM : S.K. SHAH, J.

DATE OF RESERVING THE ORDER : AUGUST 5, 2004
DATE OF PRONOUNCEMENT OF ORDER : AUGUST 13, 2004

1. This is defendant's notice of motion, seeking appointment of Court Receiver, in respect of the property bearing CS No. 657 of Girgaum Divison, situate at V.P.Road, Dr. Deshmukh Lane, admeasuring 685 square yards known as Govardhan Bhavan and injunction against the petitioners, restraining them from dealing with or disposing of or creating any third party right, title or interest in respect of the said property and shifting any of the tenants out of the said property.

2. The Petitioners are seeking probate in respect of the last Will of Smt. Hirabai Parmanand Kapadia, dated 25.9.1996. The defendant ha filed caveat and, therefore, the petition has been converted into the Suit.

3. Both the Petitioners and the defendant, the Caveatrix and Bhanubai Sundardas Kapadia are the daughters of the deceased Hirabai. So far as the property of CS No. 657 is concerned, it has been bequeathed to the petitioners and, therefore, the petitioners are claiming to be the executors and beneficiaries under the Will in respect of the said property.

4. By Development agreement, dated 23rd April, 2004, the two petitioners have given the right of development to the Respondent Hitesh Hirachand Dhokad, who has already started the work of development by entering into the agreements with the tenants residing in the suit building, getting the premises occupied by the tenants vacated from them by providing them the alternative accommodation and towards the demolition of the building etc.

5. The defendant has filed the notice of motion for the aforesaid reliefs on the ground of this development agreement, entered into by the petitioners with the respondent. She contends that the Respondent has started obtaining irrevocable consent of the tenants/occupants and has also entered into MOU with the tenants/ occupants for providing them with

permanent alternate accommodation during the pendency of this Suit. She further contend that the petitioners and the respondent have entered into either in Memorandum of Understanding or an agreement to sell of the said property, which form a part of the estate of the deceased. She came to know about the same on 3rd June, 2004 and, immediately thereafter, she filed the present notice of motion. She contends that it is just and necessary and convenient that the Court Receiver is appointed and the Respondent be injuncted from proceeding with the work of development. She further contends that if these reliefs are not granted, it would cause irreparable harm, loss and injury to her.

6. The Petitioners have resisted this notice of motion on the following grounds :-

(i) That the Caveatrix had knowledge of the petitioners' intention to give the property for development on development agreement and the defendant herself has taken part in the negotiations. Earlier the negotiations had taken place with Angarika Investment and Finance Pvt. Ltd. and M/s. Manav Builders Pvt. Ltd. However the negotiations with these companies failed. Thereafter a public

notice was also given in the Gujrathi Newspaper, namely, Bombay Samachar of 29.8.2002 (Exhibit 'H') and thereafter the negotiations were held with the Respondent and the aforesaid agreement was entered into by the petitioners with the Respondent.

(ii) That the property had become dilapidated and therefore, it was urgently necessary to take steps for demolishing the building. There were several complaints to the Bombay Municipal Corporation for carrying out necessary repairs to the said building but no steps were taken in that behalf. Therefore, the petitioners had decided to disposed of the building by entering into the aforesaid agreement. Thereafter the negotiations; had started with two companies, which failed and ultimately, the agreement was entered into with the respondent.

(iii) That the valuable properties namely, jewellery has been distributed to the daughters of the deceased as per her wish incorporated in the Will and the defendant has accepted those items of ornaments and

jewellery and, thereafter, all the sisters including the defendant, had agreed to prepare consent terms and not to object the grant of probate in favour of the petitioners. That draft has been produced at Exhibit 'J' to the affidavit in reply, filed by the petitioners. However, the said consent terms were not finalised. The contention of the petitioners, therefore, is that the defendant having accepted the items of ornaments due to her under the Will, she is estopped from disputing the said Will.

(iv) That the defendant had filed the Suit in city Civil Court, praying for the same reliefs, being Suit No. 1095/1998 and in that suit the notice of motion bearing No. 982/1998 was taken out praying for the same reliefs in that notice of motion and ultimately, the defendant withdrew the said Suit unconditionally and, therefore, the defendant cannot once again claim the same reliefs in this Suit and notice of motion.

7. On these contentions, the petitioners claim dismissal of the notice of motion, taken out by the

defendants.

8. I have heard the learned Counsel on both sides. In view of the facts and circumstances of the case, I am not inclined to grant any relief in this notice of motion.

9. The fact that the deceased had made a Will was brought to the notice of the Caveatrix and therefore, she was aware of the bequest made by the deceased in respect of all the properties including CS No. 657. As per the Will, this property of Govardhan Bhavan has been bequest exclusively to the two petitioners. Moreover, it also appears as stated in the affidavit in reply filed by the petitioners that the Caveatrix defendant had knowledge of the fact that this property was in dilapidated condition and was required to be dealt with urgently. Not only that but she also had taken part in negotiations that were made with Angarika Investment and Finance Pvt. Ltd. and M/s. Manav Builders Pvt. Ltd. The talks with these companies, however, failed. Thereafter on 29.9.2002, a public notice was issued by the Petitioners in Gujrati News Paper, namely, Bombay Samachar [Exhibit 'H'] bringing to the notice of public at large that the petitioners have set out

that the petitioners were undergoing negotiations for sale/transfer of the Govardhan Bhavan and, therefore, the Caveatrix - Defendant was knowing since then that the property was likely to be sold or transferred for the purpose of development.

10. What is essentially to be noted is that there is no dispute that the building of Govardhan Bhavan was in very bad shape and was in dilapidated condition. Various complaints were made to the Bombay Municipal Corporation in that regard, therefore, the building required urgent heavy repairs. Further, the Respondent - Developer has also entered into the agreements with the tenants - occupants of the said building for vacating the premises in the said building, either for repurchase of the same area or for permanently giving up their rights or right to purchase the same area in the newly constructed building. When so much of progress has already been made, it would not be proper at this stage to stall the development activity. Such step would not only be harmful to the interest of the petitioners and the tenants staying in the said building but also to the interest of the defendant and developers. A perusal of the agreement between the petitioners and the respondent would indicate

that it was made clear to the respondent/caveatrix that the defendant caveatrix may be having interest in the property and the respondent-developer shall negotiate with the Caveatrix. This act of development of the property, in my view cannot be said to be the act of waste necessiting the appointment of the Court Receiver.

11. As under the Will, the defendant Caveatrix does not have any interest in this building. Moreover, in this proceeding the substantive rights of the parties of inheritance or otherwise are not decided. In case, tomorrow, the Caveatrix succeeds in this suit, she would have right to file Suit to establish her claim and right to the property.

12. Under these circumstances, the notice of motion will have to be dismissed. Hence, the Order.

ORDER

1. The notice of motion is hereby dismissed with no Order as to costs.

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[S.K.Shah, J.]

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Mr. J. Rais i/b. V.M.Chaudhary for the Defendant/ Caveatrix
Mr. K. Kadam i/b. M.Dhruv & Co. for the Respondent.

CORAM : S.K. SHAH, J.
DATE : August 13, 2004.

P.C. :-

1. Heard the learned Counsel on both sides.

2. The learned Counsel for the defendant submits that the Respondent No.3 should be directed not to demolish the structure for a period of two weeks from today as he wants to file appeal against this Order.

3. The request is opposed on behalf of the Petitioners on the ground that the time granted for four weeks by the Appellate Court has already expired.

4. However, in the interest of justice, the

Respondent No.3 shall not demolish the structure for a period of two weeks, if it is not already demolished and if demolition is started, that should be stayed for a period of two weeks.

5. Certified copy of the Order is expedited.

6. Parties to act on ordinary copy of this Order, duly authenticated by the Associate of this Court.

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[S.K.Shah, J.]